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IN THE

Supreme Court of the United States

JOANNE HEDRICK, PETITIONER

v.

WESTERN RESERVE CARE SYSTEM;
FORUM HEALTH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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INTRODUCTION

The Court of Appeals for the Sixth Circuit and the U.S. District Court for the Northern District of Ohio accurately stated the pertinent, undisputed facts relating to the claims of Petitioner Joanne Hedrick ("Hedrick"). Briefly, Hedrick commenced this action against her employer, Western Reserve Care System ("WRCS"), and its holding company, Forum Health ("Forum"), claiming that they discriminated against her on account of alleged disabilities, namely, osteoarthritis in her knees and obesity, in violation of the Americans with Disabilities Act, 42 U.S.C. §12101 et seq. ("ADA"), and on account of her age, 48, in violation of the Age Discrimination in Employment Act, 29 U.S.C. §621 et seq. ("ADEA").

Basically, Hedrick claims that she was unlawfully denied placement into certain positions after she attempted to return to work following a non-work related injury. According to Hedrick, she could not return to her regular job as a general duty staff nurse and so she requested that she be considered for other positions as they became available. Hedrick rejected the first vacant position which became available. Later, she was considered for others vacancies, namely two Quality Assurance ("QA") positions and four case manager positions, but better qualified candidates were selected. Ultimately, Hedrick was offered, and she accepted, a position as an admissions nurse at no loss of earnings or benefits. In Hedrick's view, she should have been given one of the earlier available QA or case manager positions because she met the minimum

qualifications for those positions, had a disability, and was older than the candidates selected.

Summary judgment was entered against Hedrick on the basis that the record established that Hedrick was not disabled within the meaning of the ADA, and even if she were disabled, she was not entitled to any of the vacancies at issue because (1) she had turned down a reasonable accommodation, (2) she was not the best qualified applicant, and (3) she was not entitled to preferential treatment simply because she may have been disabled, especially since the disputed vacancies constituted promotions from her existing bargaining unit position. Further, there was no evidence to support Hedrick's claim she was denied certain positions on account of her age.[1]

Hedrick asserts that the Sixth Circuit erred in five (5) distinct ways when it affirmed the judgment of the district court. Her assertions do not raise any compelling reason for this Court to exercise discretionary jurisdiction over her attempted appeal of the dismissal of her claims.

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[1] Hedrick has waived any issues as to her claim against Forum or her claim that she was disabled on account of obesity.

BACKGROUND FACTS

Hedrick began working for WRCS and its predecessors as a general duty staff nurse in 1973. She performed typical bedside nursing functions. During the 1980s, Hedrick was diagnosed with osteoarthritis in her left knee. On December 1, 1995, Hedrick fractured her femur at home. She took a medical leave of absence from her job during her period of recuperation. Hedrick made an excellent recovery. There were no complications and on April 29, 1996, her treating orthopedic surgeon, Dr. Raymond Duffett, released her to return to her regular job without any restriction.

Upon being released to return to work without restriction by Dr. Duffett, Hedrick went to Dr. L. Kevin Nash, her primary care physician and friend, and told him that she did not feel that she could return to her job as a general duty staff nurse because she was concerned that she could not perform her duties. Acceding to Hedrick's request, on July 1, 1996, Dr. Nash asked WRCS to extend Hedrick's medical leave of absence.

While on leave, Hedrick was aware that WRCS had a program to find suitable employment for employees who claimed they could no longer perform their regular jobs. Employees who requested to be in the program were placed on a list. Only employees who claimed they could not perform their regular jobs and who wanted to be on the list were placed on the list.[2]

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[2] The list has on occasion been referred to as the ADA list, but this did not indicate that WRCS viewed individuals on the list as being disabled within the meaning of the ADA.

Hedrick requested that she be placed on this list. Pursuant to her request, WRCS placed Hedrick on the list and began to identify vacancies which would suit her restrictions. At no time did Hedrick ever request any accommodations to enable her to perform her general duty staff nurse job. Rather, the only accommodation which she sought was to be placed in other positions which became vacant.

In September 1996, WRCS informed Hedrick about a referral center scheduler position which became vacant. Hedrick expressed an interest in the job and an interview was arranged. During the interview, Hedrick rejected the position. According to Hedrick:

> A. I stated that I expected the cut in salary when I came back; but I did not expect that drastic of a cut when I came back.
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> ***
>
> A. They understood that, you know, with that type of cut in salary it would be a, that – excuse me. I had – because of the education and the years experience, I did not think that was a justified salary. And they understand why I felt the way I did.
>
> ***
>
> A. It became a consensus at that point in time that I was overqualified. And I told them I would not take the position.
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> ***
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> A. I assumed if they would have offered to me that with my – I just made the statement that I wasn't interested in that

position at that pont because I did not think it was for me.

Q. And is the reason you didn't think it was for you because of the salary?

A. Basically, yes.

Q. Was it your understanding that you could have had the job if you wanted it?

Q. Yes.

Contrary to Hedrick's claim that she was overqualified and the position was not appropriate for a nurse, another nurse was hired for the position.

Later, WRCS informed Hedrick about QA and case manager positions which became vacant. Hedrick expressed interests in them. She was considered for each position, but other more qualified candidates were selected. While Hedrick claims she was better qualified than some of the candidates selected, she failed to present any evidence that the reason for awarding the jobs to these other candidates was a pretext for unlawful discrimination. In August 1997, Hedrick was informed that there was an admission nurse assignment available. Hedrick expressed an interest in the job and it was given to her. She returned to work August 25, 1997, at no loss of earnings or benefits.

REASONS FOR DENYING THE WRIT

I. Hedrick is not disabled within the meaning of the ADA

The fundamental premise underlying Hedrick's claim under the ADA is that she is disabled within the meaning of the ADA. However, the record clearly establishes that she is not disabled. The ADA, 42 U.S.C. §§ 12102(2), defines disability as follows:

The term "disability" means, with respect to an individual –

a. physical or mental impairment that substantially limits one or more of the major life activities of such individual;

b. a record of such an impairment; or

c. being regarded as having such an impairment.

In this regard, Hedrick does not have a physical or mental impairment which substantially limits any major life activity, she does not have a record of any disability, and she was not regarded as disabled. With regard to a record of impairment or being considered disabled, the record merely shows that WRCS was aware that Hedrick's medical condition prevented her from, at most, performing her job as a general duty staff nurse. The fact that Hedrick was placed on a list *at her request* to assist her in finding alternative employment does not establish that she was regarded as disabled within the meaning of the ADA.

Based on the Court's decision in *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 122 S. Ct. 681, 151 L. Ed. 2d 615 (2002), the lower courts appropriately ruled that Hedrick's ADA claim fails because she is not disabled within the meaning of the ADA. Hedrick has presented no reason to reevaluate this decision. While the lower courts could have ended their analysis of Hedrick's ADA claims at this point, they went further by analyzing Hedrick's ADA claims assuming she could demonstrate she was disabled within the meaning of the ADA. Since Hedrick is not disabled within the meaning of the ADA, it is unnecessary to address the other issues raised by Hedrick. Thus, review of those issues by this Court is not warranted.

II. Assuming *arguendo* Hedrick were disabled, she lost her status as a qualified individual with a disability once she turned down the referral center scheduler position

Even if Hedrick could establish that she met the definition of disability within the meaning of the ADA, she cannot establish that she was a "qualified individual with a disability" once she turned down the referral center scheduler position. The Sixth Circuit properly concluded that the referral center scheduler position was a comparable position and that by making that position available to her, WRCS satisfied any obligation to her. In this regard, an employer is free to choose the reassignment that is to be offered to a qualified individual with a disability. If the disabled individual rejects that reassignment, the employer is under no

obligation to continue offering other reassignments. The ADA does not entitle an employee to a free ranging or perpetual right to a new position. Once an employer has offered an appropriate reassignment, its duties have been discharged.

While Hedrick asserts that she was never actually offered the referral center scheduler position, her version of the interview does not negate the undisputed fact that the job was hers if she wanted it and she turned it down. Hedrick's spin on the matter does not create a triable issue of fact.

III. There is no split among the circuits as to preferential treatment

Assuming *arguendo* that Hedrick's rejection of the referral center scheduler position was of no consequence, Hedrick still cannot establish that WRCS was required to give her a case manager or QA job without regard to her relative qualifications. Hedrick's ADA claim is that simply because she is disabled she is entitled to any vacancy for which she is minimally qualified. According to Hedrick, as long as she met the minimum qualifications of any vacant position WRCS had an obligation to give her the job of her choice. Under Hedrick's view, if the minimum qualification for CEO was a bachelor's degree and a vacancy for CEO existed, then WRCS was required to give her the CEO position. Her contention is simply not what the law requires.

In some cases, a reasonable accommodation under the ADA *may* include "reassignment to a vacant

position" [42 U.S.C. §§ 12111(9)(b); see also 29 C.F.R. §§ 1630.2(o)(2)(ii)]; however, preferential treatment is not mandated. An employer is not required to give a disabled employee preferential treatment by giving her a job for which another employee is better qualified. *See, EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024; *Malabarba v. Chicago Tribune Co.*, 149 F.3d 690 (7th Cir. 1998); *Matthews v. Commonwealth Edison Co.*, 128 F.3d 1194, 1196 (7th Cir. 1997).

Hedrick relies upon the Court's decision in *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 122 S. Ct. 1516, 152 L. Ed.2d 589 (2002), for the erroneous proposition that a disabled person is entitled to any job for which she is minimally qualified. *Barnett* does not so hold. Hedrick has taken this Court's ruling out of context and inaccurately applied it to these facts. The Court did not hold that employers must place a candidate in a position that would constitute a promotion from their former position. While a disabled person is entitled to a reasonable accommodation in order to perform the essential functions of her job, the Court has never suggested that a disabled person is entitled to the preference of being placed in another job altogether, especially where the other position would involve a promotion. *See also, White v. York Int'l Corp.*, 45 F.3d 357, 362 (10th Cir. 1995) ("The ADA does not require an employer to promote a disabled employee as an accommodation."); *Malabarba, supra*, 149 F.3d at 699 ("An employer does not have to accommodate a disabled employee by promoting him or her to a higher level position."); *Cassidy v. Detroit Edison Company*, 138 F. 3d 629 at 634 (6th Cir. 1998)("[A] reassignment will not require . . . promoting the disabled employee.").

Even the circuit court cases relied upon by Hedrick, *Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999) and *Aka v. Washington Hospital Center*, 156 F.3d 1284 (D.C. Cir. 1998), make clear that placement into a vacant position is not required if it would involve a promotion. Thus, there is no split among the circuits as alleged by Hedrick.

IV. Hedrick has not raised a substantial issue regarding the burden of proof

Hedrick asserts that the Sixth Circuit has misapplied the law regarding the elements of a *prima facie* case of discrimination under the ADA. In this regard, it matters not whether one requires that the adverse employment action be due solely to a disability or that the disability be a motivating factor because the lower courts properly concluded that Hedrick failed to present any direct evidence of discriminatory animus. Moreover, the Sixth Circuit went on to properly apply the *McDonnell Douglas* burden-shifting analysis. Regardless of the standard applied, Hedrick cannot prevail. Thus, the entire inquiry suggested by Hedrick is meaningless and does not warrant review by this Court.

V. Hedrick cannot establish pretext to support her ADEA Claim

As for Hedrick's age discrimination claim, Hedrick cannot establish that the proffered reason for selecting other better-qualified candidates for the QA and case manager positions was a pretext for unlawful age discrimination. The lower courts properly applied *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000), to the facts in this case. Hedrick did not produce any evidence to create a genuine issue of material fact as to whether the proffered explanation for selecting other candidates was merely a pretext for discrimination against her on the basis of her age. She produced no evidence to call into question the determinations that other candidates were better qualified than she. She relies solely on her subjective belief that she was better qualified than some of the candidates selected. The fact that an employee disagrees with an employer's evaluation of her does not prove pretext. Barring discrimination, a company has the right to make business judgments on employee status, particularly when the decision involves subjective factors deemed essential to certain positions. Therefore, the Sixth Circuit properly affirmed the judgment of the district court in this regard.

CONCLUSION

Petition for should be denied.

Respectfully submitted,

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